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Supreme Court of the United States

October Term, 1934.

No. 13.

DETROIT TRUST COMPANY, Trustee,
Petitioner,

against

Steamer "THOMAS BARLUM", her engines, etc.,
BARLUM STEAMSHIP COMPANY,
Respondent.

No. 14.

DETROIT TRUST COMPANY, Trustee,
Petitioner,

against

Steamer "JOHN J. BARLUM", her engines, etc.,
BARLUM STEAMSHIP COMPANY,
Respondent.

BRIEF FOR PETITIONER.

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IN THE

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Nos. 13-14.

DETROIT TRUST COMPANY, Trustee,
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DETROIT TRUST COMPANY, Trustee,
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Steamer "JOHN J. BARLUM", her engines, etc.,
BARLUM STEAMSHIP COMPANY,
Respondent.

BRIEF FOR PETITIONER.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Official Reports of the Opinions Below.

Both the prevailing and dissenting opinions of the Circuit Court of Appeals (R. 215-220, 221-227) are reported at 68 Fed. (2d) 946.

The original opinion of the District Court upon exceptions (R. 75-76) is reported at 56 Fed. (2d) 455; and the subsequent opinion of the District Court following trial of the causes (R. 180-182) is reported at 2 Fed. Supp. 733.

Statement of the Grounds on Which the Jurisdiction of the Court is Invoked.

(1) The decrees to be reviewed are those of the Circuit Court of Appeals, dated February 13, 1934 (R. 227-229).

Petitions for rehearing were subsequently denied by order of the Circuit Court of Appeals dated March 13th, 1934 (R. 229-230).

The petition for certiorari was filed March 30th, 1934, and the writ was granted April 30th, 1934.

(2) Jurisdiction is conferred upon this Court by Section 240 of the Judicial Code (as amended by the Act of February 13, 1925, 43 Stat. 938, 28 U. S. C. 347), and under Article III, Section 2, Clause 1 of the Constitution of the United States of America.

Statement of the Case.

Your petitioner, Detroit Trust Company, Trustee, is the mortgagee named in each of two preferred marine mortgages covering the Steamers THOMAS BARLUM and JOHN J. BARLUM, respectively, given pursuant to the Ship Mortgage Act 1920 (Act

June 5, 1920, Chap. 250, Sec. 30; 41 Stat. 1000-1006; 46 U. S. C., Chap. 25).

Both the Steamer THOMAS BARLUM and the Steamer JOHN J. BARLUM are vessels of the United States, of several thousand tons burden, and licensed for the coasting trade upon the Great Lakes. At the time of the making of the mortgages in suit, these vessels were owned by Barlum Steamship Company, a West Virginia corporation, having its principal office in the City of Detroit, Michigan. John J. Barlum was the principal and controlling owner of stock in the mortgagor corporation (R. 132, 133-135; R. 170, Ex. 22). He was president and Thomas Barlum was secretary of the corporation (R. 32, 67).

Thomas Barlum Mortgage (No. 13).

In February, 1929, John J. Barlum negotiated an agreement with petitioner for the purchase by petitioner of an issue of bonds to be made by Barlum Steamship Company aggregating the sum of $200,000.00, secured by a first preferred mortgage on the Steamer THOMAS BARLUM (R. 156, Ex. 7). These bonds were purchased by petitioner for sale to the general public and were largely so sold (R. 102-104, 106).

The undisputed testimony shows that the net proceeds of this bond issue, aggregating $194,800.00, were disbursed by petitioner in exact conformity with the written directions supplied by the mortgagor (R. 159, Ex. 8-A) as follows:

$50,358.33 for the refunding of the unpaid balance of a prior existing issue of notes secured by a prior existing preferred mortgage,

also executed and delivered under the provisions of the Ship Mortgage Act.

$45,510.00 for the payment of a note of Thomas Barlum & Sons Company (a corporation controlled by John J. Barlum, President of the mortgagor).

$54,490.00 for the payment of notes of John J. Barlum.

$ 1,545.23 for the payment of miscellaneous expenses in connection with the giving of the mortgage.

$42,896.44 the residue, was paid to the mortgagor (R. 158, Ex. 8) and was used by the mortgagor for the payment of accounts incurred in the operation of both vessels (R. 118, 167, Ex. 19).

According to their legal effect, these payments, other than for refunding of the prior mortgage and payment of expenses and the residue to the mortgagor, merely constituted loans made by the mortgagor out of the proceeds of the mortgage (R. 142, 131, 78) of which loans the mortgagee had knowledge prior to the making of the preferred mortgage here in question.

Default occurred February 1, 1931, whereupon petitioner invoked the jurisdiction of the District Court pursuant to Subsection K of the Ship Mortgage Act (41 Stat. 1003, 46 U. S. C. 951) for the enforcement of the lien of the mortgage.

John J. Barlum Mortgage (No. 14).

In December, 1927, similar negotiations between the parties had resulted in an agreement for the purchase by petitioner of an issue of bonds to be made by Barlum Steamship Company aggregating the like

sum of $200,000.00, secured by a first mortgage upon the Steamer JOHN J. BARLUM (R. 161, Ex. 13). These bonds were purchased by petitioner for sale to the general public and were largely so sold (R. 102-104, 106).

Of the net proceeds of the JOHN J. BARLUM mortgage, aggregating $196,733.33 there is nothing in the record to indicate that petitioner (mortgagee, trustee) had advance knowledge of the uses which the mortgagor purposed to make of the balance turned over to the mortgagor and amounting to substantially more than half such proceeds. After the mortgage was executed, delivered and recorded, petitioner (mortgagee, trustee) disbursed the moneys in exact conformity with the express directions in writing of the mortgagor (R. 162, Ex. 15) as follows:

$92,363.38 for the payment of note, bonds and coupons of John J. Barlum. After deduction of miscellaneous expenses connected with the mortgage, there was paid to the mortgagor a balance of

$102,801.55 (R. 163, Ex. 15-A).

Again, according to its legal effect, this payment, other than payment of the residue to the mortgagor, merely constituted a loan made by the mortgagor out of the proceeds of the mortgage (R. 142, 78), of which loan the mortgagee had knowledge prior to the making of the preferred mortgage here in question.

Default similarly occurred upon the John J. Barlum mortgage on December 15, 1930, and the jurisdiction of the District Court, pursuant to Subsection K of the Ship Mortgage Act, was similarly invoked for the enforcement of the lien of the mortgage.

Nature of the Suits.

Following default, libels were filed by petitioner in the United States District Court for the Western District of New York and the vessels were seized at the Port of Buffalo. The libels respectively allege the execution and delivery of the preferred mortgages to secure payment of the indebtedness evidenced by each issue of bonds.* A complete and strict compliance with the provisions of the Ship Mortgage Act is alleged. Default is pleaded and relief is sought by sale of the respective vessels and decree of foreclosure thereon (R. 7-9, 42-44).

True copies of the respective preferred mortgages were attached to the libels and were expressly made a part of the pleadings (R. 5, 40). Among the specific covenants and agreements contained in each preferred mortgage, performance of which was expressly assumed by the mortgagor under the "Assumpsit" clause, were covenants (1) that the mortgagor had authority to mortgage and that all requisite action had been effectively taken (R. 17, 51, Art. I); and (2) that the mortgagor would comply with the provisions of the "Ship Mortgage Act, 1920" so as to create, establish and maintain such mortgage as a first preferred mortgage under said Act (R. 20, 54, Art. VI; R. 22, 56, Art. XIII). These covenants are emphasized by the further covenant that the mortgagor would "do all things necessary to preserve the lien of this mortgage as a first and prior lien upon said vessel" until full payment (R. 21, 55, Art. X).

* Whether the mortgages here involved are preferred is one of the issues in these cases. However for convenience of description we refer to them henceforth as preferred mortgages.

In each of the cases Barlum Steamship Company (mortgagor) made claim to the vessel but failed to file bond for the release thereof. Barlum Steamship Company then attacked the jurisdiction of the District Court by exceptions in each case. After hearing, the exceptions were overruled by the District Court (R. 75-78). Answers to the libels were then interposed. The answers first *admit* every allegation of the libels (R. 78). Two separate affirmative defenses are therein alleged; the first of which alleges that the indebtedness of respondent to petitioner in the sum of $200,000.00, as evidenced by bonds aggregating that amount to secure payment of which the respective mortgages were given, arose out of the loan of moneys to the mortgagor in that amount, and that said moneys were *used* by the mortgagor almost entirely for non-maritime purposes, *i. e.*, for loans made by the mortgagor to others, to the knowledge of the mortgagee (petitioner) when the mortgages were executed and delivered. The second defense is the same as was urged by exceptions, *i. e.*, that the facts alleged in the libel did not constitute a cause of action within the admiralty and maritime jurisdiction of the Court; and that the Ship Mortgage Act, 1920, insofar as it purported to permit the enforcement of the lien of the mortgages by libel *in rem* in admiralty, and to grant original jurisdiction to the Court, is violative of, and in contravention of Article III, Section 2 of the Constitution of the United States (R. 78-79).

Notwithstanding that the answers admit every allegation of the libels, the mortgagor took testimony by deposition in support of the allegations contained in the separate defenses of the answers, over the express

objection and exception of petitioner concerning all examination bearing upon either separate defense contained in the answers (R. 83-84).

This testimony clearly showed that it was the established practice of the mortgagor to loan substantial portions of its funds to other Barlum interests. John J. Barlum, President of the mortgagor (respondent), testified that it was his practice to borrow money back and forth between the various corporations of which he was the head; and that all the moneys that went from Barlum Steamship Company to the other corporations were loans by the Barlum Steamship Company to those corporations (R. 141, 142). He further testified that the payments made out of the proceeds of both mortgages in suit by petitioner were made as the result of express authorization in writing by his corporation and signed by him (R. 141). Such appears from the written authorizations placed in evidence (R. 159, Ex. 8-A; R. 162, Ex. 15). Mr. Barlum's testimony as to loans made by Barlum Steamship Company out of the proceeds of the mortgages was verified by Ruth Alleman, his secretary and also bookeeper for the mortgagor, who testified that certain specific items paid by the mortgagee upon the authorization of the mortgagor were charged as debits upon the books of the mortgagor corporation against the individual and corporations receiving such payments and still remained owing and unpaid to Barlum Steamship Company (R. 131). Upon cross-examination Mr. Barlum identified the consents of stockholders to mortgage the respective steamers (R. 142, R. 171, Ex. 23; R. 174; Ex. 25) and testified to the correctness of certified copies of resolutions

adopted by the Board of Directors of Barlum Steamship Company concerning the procuring of the respective loans upon the security of preferred mortgages on said respective vessels (R. 142, R. 173, Ex. 24; R. 176, Ex. 26). These resolutions each recite in part as follows:

> "WHEREAS, it is necessary to borrow the sum of two hundred thousand dollars ($200,000.00) *for the use and benefit of the S. S. '.....'* and said amount may be obtained from the Detroit Trust Company, Trustee, *on the security of a preferred mortgage on said steamship* * * *."
>
> "BE IT FURTHER RESOLVED, that the president and secretary of this corporation be, and they hereby are, authorized and directed * * * to also make, execute and deliver to said Detroit Trust Company, Trustee, *said first preferred mortgage* in the name and under the seal of this corporation." (Italics ours.) (R. 173, 176.)

Proofs as to the defaults and the amounts due under the mortgages were taken and the issues and evidence were submitted to the District Court. A further opinion was filed by District Judge Adler upholding the right of the mortgagee (petitioner) to enforce the respective preferred mortgages in a Court of Admiralty as provided by the Ship Mortgage Act and decrees were ordered submitted (R. 180-182).

Decrees were entered in the respective suits providing for foreclosure and directing sale of the respective vessels to satisfy the amounts found to be due (R. 182, 190).

The mortgagor (respondent) then appealed to the United States Circuit Court of Appeals for the Second

Circuit which by a divided Court reversed the decrees of the District Court (R. 227-229). Petitions for rehearing were subsequently denied (R. 229, 230).

Decision of the Circuit Court of Appeals.

The prevailing opinion of the Circuit Court of Appeals (Manton and Chase, C. J.) held:

1. That the jurisdiction of the District Court over an action *in rem* to foreclose a preferred mortgage complying with all the express provisions of the Ship Mortgage Act may be defeated by showing that the mortgagor and mortgagee had advance knowledge that a substantial part of the proceeds of the mortgage was to be used for non-maritime purposes.

2. That the result follows notwithstanding the libel alleges and the answer admits that the mortgage in question is a preferred mortgage under the Act.

3. That admiralty jurisdiction over the foreclosure of preferred mortgages on vessels is limited to mortgages the proceeds of which were used "to develop and encourage the maintenance of a merchant marine."

4. That the use made of the moneys (the proceeds of these mortgages) was so non-maritime in character as to take the mortgages in suit out of the purview of the Ship Mortgage Act (R. 215-220).

The dissenting opinion of the Circuit Court of Appeals (A. N. Hand, C. J.) held:

1. That since each mortgage admittedly was a valid mortgage and since the owner (mortgagor) in all re-

spects complied with the provisions of the Ship Mortgage Act relating to preferred mortgages, each mortgage attained a preferred status.

2. That the Ship Mortgage Act was passed in aid of the development and encouragement of our merchant marine, and was intended to give to ship mortgages complying with the statute a status permitting their more advantageous employment by way of promotion of investment than had been theretofore enjoyed.

3. That to make the status of a preferred mortgage depend upon the purposes for which it is given is to engraft upon the plain words of the statute an exception seemingly contrary to its terms and not required by any convincing public policy.

4. That the whole matter is one of the creation and displacement of liens upon ships as essential marine instrumentalities over which Congress has complete control under its power to alter, qualify or supplement the maritime law.

5. That the mortgages in suit being admittedly valid as preferred mortgages, the admiralty court had jurisdiction and the decrees ordering sales of the vessels for the satisfaction of the liens of the mortgages should be affirmed (R. 221-227).

Issues Involved.

The case, therefore, presents the following questions:

1. Was it the intention of Congress in enacting Subsection K of the Ship Mortgage Act to withhold jurisdiction of an action *in rem* brought to foreclose a preferred mortgage in all cases where the mortgagor and mortgagee knew in advance that a substantial part of the proceeds was to be devoted to non-maritime uses?

2. If Congress intended to create a preferred mortgage lien in all cases where the provisions of the Ship Mortgage Act are strictly complied with, irrespective of the devotion of the proceeds to non-maritime uses, has it the power so to do under Article III, Section 2 of the Constitution?

3. Can jurisdiction of a District Court over an action *in rem* brought under Subsection K of the Ship Mortgage Act be defeated without destroying the status of a mortgage as a preferred mortgage under the Ship Mortgage Act?

Specifications of Error Intended to Be Urged.

The United States Circuit Court of Appeals for the Second Circuit erred in the following particulars:

1. In holding that it was the intention of Congress in enacting Subsection K of the Ship Mortgage Act to withhold jurisdiction of an action *in rem* brought to foreclose a preferred mortgage in all cases where the mortgagor and mortgagee knew in advance that a substantial part of the proceeds was to be devoted to non-maritime uses.

2. In holding that the jurisdiction of a District Court over an action *in rem* brought under Subsection

K of the Ship Mortgage Act may be defeated without destroying the status of a mortgage as a preferred mortgage under the Ship Mortgage Act.

3. In holding that strict compliance with all the express provisions of the Ship Mortgage Act does not of itself vest jurisdiction in the District Court over an action *in rem* to foreclose the mortgage, but that jurisdiction may be defeated by testimony *aliunde* that the loan was not made to be used for purposes of navigation or relating to things maritime.

4. In failing to hold that the Ship Mortgage Act was constitutional irrespective of the use of the proceeds of the mortgages.

5. In failing to hold that the District Court had jurisdiction to foreclose the preferred mortgages in suit irrespective of the use of the proceeds of the mortgages.

6. In misconceiving or disregarding the legal effect of the disposition by the mortgagor of the proceeds of the preferred mortgages in suit.

7. In reversing the decrees of the District Court directing foreclosure and sale of the mortgaged vessels as prayed for in the libels.

POINT I.

The provisions of the Ship Mortgage Act are valid and constitutional within the power of Congress implied under Article III, Section 2 of the Constitution to alter, qualify or supplement our national system of maritime law as experience or changing conditions may require.

The essential and undisputed facts upon which the decision of these cases must turn are as follows:

The Barlum Steamship Company, the owner of the Steamers THOMAS BARLUM and JOHN J. BARLUM, both vessels duly enrolled and licensed under the laws of the United States and engaged in commerce and navigation on the Great Lakes, their connecting and tributary waters, executed and delivered to the Detroit Trust Company, Trustee, a preferred mortgage on each ship for $200,000.00. The mortgages were drawn under the provisions of the Ship Mortgage Act (Section 30 of Chapter 250, Act of June 5, 1920, 46 U. S. C., Chapter 25) (printed in full in the appendix) and the answers interposed to the libels filed for the foreclosure of these mortgages expressly admit that every formality required by the Act to make them preferred mortgages under the Act was fully met.

At the time of the execution and delivery of the mortgages the mortgagor loaned a substantial portion of the proceeds of each mortgage to third parties. The amount of the loans was charged on the books of the mortgagor against the borrowers, who in turn devoted the amount of such loans to non-maritime uses. The mortgagee knew to the extent noted in the statement

of facts at the time the mortgages were executed and delivered and the consideration paid that the mortgagor purposed to make the loans in question.

Following default these suits *in rem* were instituted in the United States District Court for the Western District of New York for the foreclosure of the mortgages as provided by Subsection K of the Ship Mortgage Act. In these suits, as before stated, every allegation contained in the libels was expressly admitted, but affirmative defenses attacked the constitutionality of the Ship Mortgage Act and the jurisdiction of the Court, sitting in admiralty, to foreclose.

The constitutionality of the Act, as well as the jurisdiction of the District Court, was sustained. On appeal to the Circuit Court of Appeals for the Second Circuit the decrees of the District Court were reversed. The majority opinion of the Circuit Court of Appeals concedes the power of Congress to enact the Ship Mortgage Act only if the mortgage be given to secure the payment of moneys actually devoted to such maritime uses as would support a suit in admiralty either *in rem* or *in personam* if the mortgage did not exist. Judge Augustus N. Hand in his dissenting opinion so construes the majority opinion (R. 224). The majority opinion unsuccessfully attempts to confine its decision to narrower limits, attempting to base its decision upon advance knowledge of the mortgagee that these loans were to be made by the mortgagor and used in turn by the borrowers for non-maritime purposes, and not upon the fact itself that a substantial part of the proceeds was devoted to non-maritime uses.

In thus attempting to narrow the basis of its decision, the majority opinion says:

> "We need not decide whether or not a loan made for maritime purposes secured by a mortgage on a ship will become non-maritime if the borrower, contrary to the agreement of the mortgage, diverts the money to non-maritime purposes * * *." (R. 218-219.)

This was the precise question presented for decision. The agreement of each mortgage was, and is, that it should be a preferred mortgage lien under the Ship Mortgage Act. The mortgagor did make loans to borrowers, who in turn used the moneys for non-maritime purposes. Mere advance knowledge of the mortgagee that the moneys were to be so used cannot possibly defeat jurisdiction. If jurisdiction be defeated, it must be by reason of the fact itself, and not mere knowledge of the fact in the mortgagee.

The majority opinion then continues:

> "Nor need we consider what effect any estoppel in such case would have" (R. 219).

The question of estoppel was squarely presented since the mortgagor was permitted to offer, and the Court based its decision on, testimony which, by virtue of the express covenants in the mortgages, the mortgagor was estopped from urging.

The majority opinion finally holds (R. 220) that though the Ship Mortgage Act says nothing about how a loan secured by a ship mortgage is to be used, Congress intended that a maritime use should be made of the proceeds. By necessary inference, the opinion

holds that if Congress intended to place no limitation on the use of the moneys secured by the mortgage, and intended and provided that the preferred status of the mortgage, once attained, continued irrespective of the use made of the moneys, Congress exceeded its power under Article III, Section 2 of the Constitution; and that in the absence of such an express provision in the Act itself the statute would not be so construed.

That we have correctly stated the plain import of the majority opinion is made manifest by the dissenting opinion by Judge Augustus N. Hand (R. 221-227).

The construction placed upon the Ship Mortgage Act by the court below finds no support in any canon of construction. The intention of Congress must be evidenced by the terms of the Act itself, unless the language chosen is so ambiguous as to make recourse to Congressional debates necessary.

> Fairport P. & E. R. Co., v. Meredith, ... U. S. ...., (decided June 4, 1934) and cases there cited.

The language of the Act is so clear and explicit that no such reference is necessary. The statute prescribes in detail and separately states a series of requirements necessary to be performed in order to create a preferred mortgage under the statute. These things being done, the statute decrees that the mortgage shall constitute a preferred mortgage lien superior to all other maritime liens against the ship, except those enumerated in the statute.

The Ship Mortgage Act was enacted as a part of the Merchant Marine Act, 1920, being Section 30 thereof (Act of June 5, 1920, Chapter 250). The first section of the Merchant Marine Act, 1920, discloses the intention of Congress with respect to the entire subject matter wherein it is recited:

> "It is necessary for the national defense and for the proper growth of its foreign and domestic commerce that the United States shall have a merchant marine of the best equipped and most suitable types of vessels sufficient to carry the greater portion of its commerce and serve as a naval or military auxiliary in time of war or national emergency, ultimately to be owned and operated privately by citizens of the United States; and it is declared to be the policy of the United States to do whatever may be necessary to develop and encourage the maintenance of such a merchant marine."

In keeping with such declaration of policy the Merchant Marine Act, by Section 11 thereof, created a construction loan fund for the purpose of furnishing loans to citizens in aid of the construction of new vessels and requiring security by way of first lien upon the vessel so constructed. By subsequent amendment, adopted in 1924, it was provided that upon completion of the vessel such security should include a preferred mortgage complying with the provisions of Section 30 of the Act. The provisions respecting construction loans and security therefor have been amended and re-enacted by the following statutes:

Act June 6, 1924, Ch. 273, Sec. 1, 43 Stat. 467;
Act Mar. 4, 1927, Ch. 512, Sec. 1, 44 Stat. 1451;
Act May 22, 1928, Ch. 675, Sec. 301(a), 45 Stat. 690;
Act Feb. 2, 1931, Ch. 100, 46 Stat. 1059.

When considered in the light of the prior provisions of the Merchant Marine Act referred to, the intendment of Congress in enacting the Ship Mortgage Act is a logical development of the national policy expressed in the Merchant Marine Act. If reference to Congressional debates is necessary to determine the intention of Congress, it is evidenced by the remarks of Senator Wesley L. Jones, reporting for the Senate Committee on Commerce (Senate Reports, Vol. I, 66th Congress, 2nd Session, page 9 of Report #573), who said:

> "Mortgage security on ships now is practically worthless. We make it good except as to certain demands, which should be superior to everything else, such as wages. We want our people and capital interested in shipping and shipping securities. If we can bring this about, one of the greatest problems of our merchant marine will be solved. The English people are financially interested in their shipping. We must have our people interested in ours."

Under the construction given to the statute by the court below, in every suit *in rem* brought for the foreclosure of a preferred mortgage the first field of inquiry will necessarily be whether or not the proceeds beyond an inconsiderable portion, were devoted to maritime uses. If not, did the mortgagee have knowledge at the time the mortgage was given that the mortgagor intended to apply a substantial part of the proceeds to non-maritime uses? If the question of knowledge or lack of knowledge is disputed, the Court must retain jurisdiction in the first instance solely for the purpose of deciding this disputed question of fact. If advance knowledge be found, the Court must order a dismissal for lack of jurisdiction. The majority

opinion further leaves it to the discretion of individual judges to determine what part of the proceeds may be devoted to non-maritime uses before jurisdiction is destroyed. A mere statement demonstrates the utter fallacy of the reasoning. Jurisdiction may be defeated only by destroying the preferred status of the mortgage itself.

Moreover, it follows from the language of the Act itself that Congress did not intend to impose any implied limitations on the use of the proceeds of preferred mortgages given under the Act. Such result is fairly evidenced by the express provisions of paragraph (e) of Subsection D of the Act (see appendix).

By this section, Congress has made express provision for a single mortgage covering a ship concurrently with any other conceivable form of property, and has provided that the sole requirement necessary to be observed for the maintenance of such mortgage as a preferred mortgage on the vessel shall be a provision contained in the mortgage providing for a separate discharge of such other property by the payment of a specified portion of the mortgage indebtedness and by the endorsement on the vessel's documents of the amount so required to be paid.

The intention ascribed to Congress by the majority of the Circuit Court of Appeals is further negatived by Section 11 of the Merchant Marine Act, 1920, as amended, to which we have already directed attention, providing for the loan of funds in aid of private construction of vessels, concededly a non-maritime use.

Peoples Ferry Co. v. Beers, 20 How. 393.

It is obvious that Congress contemplated no allocation of the proceeds of such a mortgage to specific uses. If such had been the intention of Congress, unquestionably specific provision therefor would have been incorporated in the statute. The construction indulged by the majority of the Circuit Court of Appeals is not based upon the language of the Ship Mortgage Act. Indeed, such construction conflicts with the intention of Congress as expressed in paragraph (e) of Subsection D of the Act (see appendix); and no other provision of the Ship Mortgage Act lends support to the conclusion reached.

The petitioner contends:

1. That the Act creates a preferred mortgage lien on ships in every case where the requirements of the Act are strictly observed.

2. That it was not the intention of Congress to limit the use of the proceeds of preferred mortgages to maritime purposes in order to maintain a preferred status of the mortgage.

3. That Congress has full authority under Article III, Section 2 of the Constitution to create a new preferred mortgage lien on ships irrespective of the use to which the proceeds of the mortgage may be put.

4. That in creating a preferred mortgage lien Congress had authority to displace other maritime liens on ships making them secondary to a preferred mortgage lien.

5. That Congress, in thus creating a preferred mortgage lien, had authority to vest exclusive juris-

diction in the District Courts, sitting in admiralty, over an action *in rem* for the foreclosure of the mortgage lien.

6. That if Congress has the power under Article III, Section 2 of the Constitution to create a preferred mortgage lien, jurisdiction over an action *in rem* to foreclose the lien would automatically vest in the District Court by force of the general grant of jurisdiction to that Court by the Judiciary Act.

Article III, Section 2 of the Constitution extends the judicial power to "all cases of admiralty and maritime jurisdiction".

Article I, Section 8 confers upon Congress power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States or in any department or officer thereof".

Collectively, the sections quoted constitute the basis of the authority of Congress over the subject matter.

The purpose of the grant was to place the entire subject matter, both substantive law and procedure, under federal control, because of its intimate relation to interstate and foreign commerce and to navigation, and it may be added—to ships, the sole instruments of navigation.

The Lottawanna, 21 Wall. 558;
The Belfast, 7 Wall. 624;
Waring v. Clarke, 5 How. 441;
Panama R. R. Co. v. Johnson, 264 U. S. 375.

Construing and applying the quoted provisions of the Constitution, this Court in *Panama Railroad Co. v. Johnson, supra,* said:

> "Although containing no express grant of legislative power over the substantive law, the provision was regarded from the beginning as implicitly vesting such power in the United States. Commentators took that view, Congress acted on it, and the courts, including this Court, gave effect to it. Practically, therefore, the situation is as if that view were written into the provision. After the Constitution went into effect, the substantive law theretofore in force was not regarded as superseded, or as being only the law of the several states, but as having become the law of the United States, —subject to power in Congress to alter, qualify or supplement it as experience or changing conditions might require."

In the case of *The Lottawanna, supra,* this Court said at page 577:

> "It cannot be supposed that the framers of the Constitution contemplated that the law should forever remain unalterable."

In the case of *Southern Pacific Company v. Jensen,* 244 U. S. 205, this Court said at page 215:

> "Considering our former opinions, it must now be accepted as settled doctrine that, in consequence of these provisions, Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country."

Citations might be multiplied which establish that Congress has power within the limits of the Constitution to alter, qualify, revise or supplement the general maritime law whenever experience or changing conditions make it desirable or necessary.

Recent cases reaffirming the principle are:

Crowell v. Benson, 285 U. S. 22;

United States v. Flores, 289 U. S. 137.

Illustrations of the repeated exercise by Congress of its power to make substantive changes in the law maritime embrace the following:

By the Judiciary Act of 1789 (Act. Sept. 24, 1789, Ch. 20, Sec. 9; 1 Stat. 76) Congress provided that the District Courts have jurisdiction, in admiralty, of cases of seizure under the impost, navigation or trade laws. This declaration by Congress—contemporary with the adoption of the Constitution—is a significant evidence of the amplitude of the power of Congress as then understood. The jurisdiction so conferred was several times thereafter upheld by this Court.

The Margaret, 9 Wheat. 421;

Waring v. Clarke, supra.

The Act of March 3, 1851 (Ch. 43, 9 Stat. 635, 636), providing for limitation of liability of vessel owners, made a radical change in our substantive maritime law. The opinion of this Court in the case of *The Main v. Williams,* 152 U. S. 122, is authority for the statement that the enactment was adopted as a consequence of the rejection by this Court of the plea of limitation of responsibility urged by a water carrier before this Court in 1848 in the case of *The New Jersey Steam Navigation Co. v. The Merchant's Bank,* 6 How. 344. Uneasiness being thereby produced among ship owners, Congress enacted the measure in order to place American shipping on a parity with the principal maritime nations.

By the Act of June 26, 1884, (Ch. 121, Sec. 18; 23 Stat. 57, 46 U. S. C. 189) Congress further radically extended the operation of the Limited Liability Act by providing for the limitation of the individual liability of a ship owner to the proportion of any and all debts and liabilities his individual share of the vessel bore to the whole. In *Richardson v. Harmon,* 222 U. S. 96, this Court held that the provisions of the Act of June 26, 1884, extended to and included non-maritime torts, and determined that the owner of a vessel could limit his liability in admiralty for the destruction of a bridge, concededly a land structure. The analogy to the case at bar is close and persuasive. The vessel itself is the instrument of navigation and the foundation of jurisdiction, in each case. The liability of the vessel represents the expansion of the jurisdiction; in the one case, liability for torts; in the other for the mortgage money. The admiralty characteristic comes, however, from the first element, the vessel, and is not dependent at all on the second element, the liability. It follows that the use which is made of the second element may be completely non-maritime; in the one case, injury to land structure, in the other, use of the mortgage money for loans to land enterprises.

The Act of June 23, 1910 (Ch. 373, 36 Stat. 604) created a maritime lien for supplies furnished in the home port of a vessel where no lien had theretofore existed under our general maritime law.

This Court, in the case of *Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co.,* 254 U. S. 1, said that the purpose of the enactment was threefold:

(1) To do away with the distinction theretofore existing between supplies furnished in a foreign port and supplies furnished in the home port of a vessel; (2) To do away with the doctrine that materialmen did not intend to rely upon the credit of the vessel when the owner contracted or was present in person; (3) To substitute a single federal statute for state statutes of varying import respecting liens for repairs and supplies.

By the re-enactment of this statute into the Merchant Marine Act of 1920, as Subsection P of Section 30 and succeeding sections, Congress reaffirmed its prior creation of a maritime lien for necessaries furnished a vessel, whether foreign or domestic; thus emphasizing its power over the subject matter.

The Act of March 4, 1915, Chapter 153, Section 20, commonly known as the Jones Act, extended to injured seamen the rights accorded by the Federal Employer's Liability Act and permitted such rights to be administered either in state or federal courts. In granting such rights, Congress modified our prior maritime law giving to injured seamen allowances for wages and for maintenance and cure. See *Lindgren v. United States*, 281 U. S. 38.

In 1927, Congress enacted the statute known as the Longshoremen's and Harbor Workers' Compensation Act (Act Mar. 4, 1927, Ch. 509, Sec. 1; 44 Stat. 1424; 33 U. S. C. Ch. 18). This statute, which is designed to provide compensation for injured maritime workers where recovery be not validly provided by state law was declared by this Court in the case of *Crowell v.*

Benson, supra, to have been a valid exercise by Congress of its power to alter and revise the maritime law which prevails throughout the country.

To the Federal Courts was allocated the function of declaring the law. In exercising the function the courts in all cases of conflict in rules of decision between maritime nations adopted the rule which seemed best suited to the peculiar needs of this country. Congress was given the power to modify any rule of substantive law, but in the absence of action by Congress this Court has, and has exercised, the power to change or modify the law as experience or changing conditions may require. An illustration of the exercise of this power is the case of *The Genesee Chief,* 12 How. 443, in which this Court expressly overruled the case of *The Thomas Jefferson,* 10 Wheat. 428. In the latter case this Court had limited the jurisdiction of admiralty to tidal waters. In *The Genesee Chief, supra,* the decision was expressly overruled and actual navigability made the test for determining the extent of admiralty jurisdiction.

In the last analysis the decision of the Court in the case of *The Genesee Chief, supra,* was merely an interpretation of the Constitution, not only in the light of changing conditions and the lessons of experience, but as well because of factors which were not considered when the case of *The Thomas Jefferson* was decided.*

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* This power of the Court to overrule prior decisions has been frequently exercised (see cases Note II, dissenting opinion of Mr. Justice Brandeis in **Burnet v. Coronado Oil & Gas Co.**, 285 U. S. 393, at pages 407 and 408).

A recent exercise of the power of the Court generally is found in the case of **Funk v. United States**, 290 U. S. 371, wherein an ancient rule of the common law was abrogated—this though there is no national common law. The only apparent limitation on the power of the Court in this regard is the doctrine of **Stare Decisis** which can have no application in the present case.

Mention is made of this recognized power of the Court for the reason that the majority of the court below seem to be imbued with the theory that since this Court said in the case of *Bogart v. The John Jay,* 17 How. 399, that a chattel mortgage on a ship did not possess sufficient of the elements of a maritime loan to give a district court, sitting in admiralty, jurisdiction over an action *in rem* to foreclose it, the decision marks the boundary for all time beyond which neither Court nor Congress may go, and that, therefore, the Act of Congress creating preferred mortgages on ships is constitutional only if the proceeds of the mortgage in their substantial entirety are devoted to maritime uses. The same theory was previously unsuccessfully urged in the case of *The Oconee,* 280 Fed. 927; *The Nanking,* 292 Fed. 642; and *The Lincoln Land,* 295 Fed. 358.

The constitutionality of the Ship Mortgage Act was first attacked in the case of *The Oconee, supra.* It was there urged (1) that the limits of the admiralty and maritime jurisdiction granted by Article III, Section 2 of the Constitution are co-extensive only with the jurisdiction exercised by the admiralty courts at the time of the adoption of the Constitution; (2) that Congress had no power, express or implied, to extend those limits then exercised; (3) that since under the general maritime law, as declared in the case of *Bogart v. The John Jay, supra,* admiralty had no jurisdiction over an action to foreclose a mortgage on a ship, it was not within the power of Congress to enlarge that jurisdiction, and finally (4) that this resulted from the fact that a mortgage on a ship was essentially non-maritime because it involved only property rights and had nothing to do

with navigation. The contentions there made were conclusively answered by Judge Groner in an opinion based on sound reasoning and supported by abundant authority.

The constitutionality of the Act was again attacked in the case of *The Nanking, supra,* in which the same contentions were urged. Judge Partridge in his opinion suggests additional reasons not found in the opinion of Judge Groner for sustaining the constitutionality of the Act.

The constitutionality of the Act was again attacked in the case of *The Lincoln Land, supra.* Judge Brewster upheld the constitutionality of the Act on the reasoning of Judge Groner in *The Oconee, supra.*

Cases in district courts and in circuit courts of appeal where the validity of the Act was assumed are the following:

The Egeria, 294 Fed. 791 (C. C. A. 9);
The Northern Star, 7 Fed. (2d) 505 (C. C. A. 2);
National Bank v. Enterprise Marine Dock Co., 43 Fed. (2d) 547 (C. C. A. 4);
Consumer's Co. v. Goodrich Transit Co., 53 Fed. (2d) 972, (C. C. A. 7) Cert. denied 286 U. S. 548;
The Owego, 292 Fed. 403 (E. D. La.);
The Northern No. 41, 297 Fed. 343 (S. D. Florida);
The Moshulu, 298 Fed. 348 (N. D. Cal.);
The Henry W. Breyer, 17 Fed. (2d) 423, (D. Maryland);
The Red Lion, 22 Fed. (2d) 329, (E. D. N. Y.).

In the case of *Morse Drydock & Repair Co. v. Steamer Northern Star,* 271 U. S. 552, counsel apparently regarded the constitutionality of the Act as so well established that the question was not raised and this Court, in deciding the case, assumed that the Act was valid and constitutional.

Again, in the case of *United States v. Flores, supra,* this Court cited the case of *The Oconee, supra,* with approval.

Little is to be added to the cogent reasoning of Judge Groner and Judge Partridge in sustaining the validity of the Act in question. This, however, may be suggested:

To ships, from ancient times, have been ascribed attributes not possessed by any other form of property. Under the general maritime law the ship is regarded as a *personified res* against which the maritime lien or "privilege" directly operates. Though inanimate, the ship, being a *personified res,* within the limits not necessary to detail, is directly liable to the same extent as a person or corporation, Though inanimate, the negligence of its master and crew fixes direct liability upon it. The act of the master or owner in procuring supplies or repairs produces the same result. Her status and peculiar attributes are best described by Mr. Justice Brown in the case of *Tucker v. Alexandroff,* 183 U. S. 424, at page 438, as follows:

> "A ship is born when she is launched, and lives so long as her identity is preserved. Prior to her launching she is a mere congeries of wood and iron —an ordinary piece of personal property—as distinctly a land structure as a house, and subject only to mechanics' liens created by state law and

enforceable in the state courts. In the baptism of launching she receives her name, and from the moment her keel touches the water she is transformed, and becomes *a subject of admiralty jurisdiction.* She acquires a personality of her own, becomes competent to contract, and is individually liable for her obligations, upon which she may sue in the name of her owner and be sued in her own name. Her owner's agents may not be her agents, and her agents may not be her owner's agents. *The China,* 7 Wall. 53, sub. nom., *The China v. Walsh,* 19 L. Ed. 67; *Thorp v. Hammond,* 12 Wall. 408, 20 L. Ed. 419; *Workman v. New York City,* 179 U. S. 552, 45 L. Ed. 314, 21 Sup. Ct. Rep. 212; *United States v. The Little Charles,* 1 Brock, 347, 354; Fed. Cas. No. 15,612; *The John G. Stevens,* 170 U. S. 123, 125, 126, 42 L. Ed. 973, 974, 18 Sup. Ct. Rep. 544; *Homer Ramsdell Transp. Co. v. La Compagnie Generale Transatlantique,* 182 U. S. 406, 45 L. Ed. 1155, 21 Sup. Ct. Rep. 831. She is capable too, of committing a tort, and is responsible in damages therefor. She may also become a *quasi* bankrupt; may be sold for the payment of her debts, and thereby receive a complete discharge from all prior liens, with liberty to begin a new life, contract further obligations and perhaps be subjected to a second sale." (Italics ours.)

Finally, the ship, to quote from the language of Judge Augustus N. Hand in his dissenting opinion, is "not only the very symbol but the instrument of marine jurisdiction." Without the ship there can be no general maritime law. Without the ship there would, therefore, be no courts of admiralty for there would be no water-borne commerce. Without the ship there would be nothing to which maritime jurisdiction could attach. Without the ship the language of the Constitution under discussion would be without application or meaning.

The suggested considerations were perhaps in the minds of the Court when Mr. Justice Wayne, writing for the Court in the case of *Bogart v. The John Jay, supra,* and referring to the extension of English Admiralty Jurisdiction over marine mortgages by virtue of Stat. 3 and 4, Vict., Chapter 65, said "until that shall be done in the United States by Congress the rule in this particular must continue in the admiralty courts of the United States as it has been."

The quotation evidences the fact that the Court, as then constituted, had no doubt as to the power of Congress to so extend the jurisdiction.

The question decided in the case of *Bogart v. The John Jay, supra,* was purely one of jurisdiction. It is obviously the function of the Court, and not of Congress, to mark the boundaries within which substantive law operates. The rule by which the boundaries are thus marked is stated by this Court in *Panama R. R. Co. v. Johnson, supra,* at page 386, as follows:

> "When all is considered, therefore, there is no room to doubt that the power of Congress extends to the entire subject and permits of the exercise of a wide discretion. But there are limitations which have come to be well recognized. One is that there are boundaries to the maritime law and admiralty jurisdiction which inhere in those subjects and cannot be altered by legislation, as by excluding a thing falling clearly within them or including a thing falling clearly without."

Is then the hypothecation of a ship, the sole instrument upon which the general maritime law operates, so essentially non-maritime in character as to forever

preclude either Court or Congress from making it a subject of admiralty jurisdiction, except in cases where the proceeds of the mortgage are devoted in their substantial entirety to maritime uses? Judge Partridge pertinently suggests in the case of *The Nanking, supra,* at page 644, that the distinction between a bottomry bond and a ship mortgage is not as wide as the Court infers in the case of *The John Jay, supra.* Jurisdiction of admiralty courts over bottomry bonds is unquestionable.

Time and experience having added light to the language of the Constitution, the decision of this Court in the case of *Bogart v. The John Jay, supra,* presents no present obstacle to the power of Congress to enact the statute in question or the power of the Court to declare it constitutional.

POINT II.

If the power of Congress has been validly exercised and the mortgages in suit are preferred mortgage liens under the Act, the jurisdiction of the District Court over an action *in rem* to enforce them necessarily follows.

The Constitution extended the judicial power to "all cases of admiralty and maritime jurisdiction." The grant became operative when the Congress under Article I, Section 8 of the Constitution created tribunals inferior to the Supreme Court and defined the jurisdiction of all inferior tribunals and the appellate jurisdiction of this Court.

Upon the organization of the Courts the determination of the boundaries of the jurisdiction under Article III, Section 2 of the Constitution of both courts and the Congress became a judicial function.

The St. Lawrence, 1 Black 522, 527;
The Belfast, supra, at pages 640, 641;
The Lottawanna, supra, at pages 575-576;
Butler v. Boston & Savannah S. S. Co., 130 U. S. 527, at page 557;
The Blackheath, 195 U. S. 361, 365;
Panama R. R. Co. v. Johnson, supra, at page 386;
Crowell v. Benson, supra, at page 55.

It results that the jurisdiction of Congress is circumscribed by the boundaries fixed by the Court; and the latter in determining the extent of the jurisdiction of the Congress, at the same time determines the limits of its own jurisdiction over the subject matter. Thus the jurisdiction of the Court goes hand in hand with the power of Congress, touching at every point. If the power of Congress has been validly exercised under the Constitution, as interpreted by the Court, jurisdiction of the admiralty court over the subject matter automatically attaches by virtue of 28 U. S. C. Section 41, subdivision 3. The language of the section is the same as the language of the Constitution, and it necessarily follows that the jurisdiction is co-extensive with the terms of the grant of judicial power over the subject matter by the Constitution.

Insurance Co. v. Dunham, 78 U. S. 1.

Since the decision of this Court in the case of *The Genesee Chief* made the navigable character of the

public waters the jurisdictional test of the geographical boundaries, it follows as a necessary corollary that the ship is the fundamental object of the jurisdiction and the waters where the ship may navigate mark the territorial limits of the jurisdiction over the object.

The principal subjects of jurisdiction are three—contracts, crimes and torts. Whether a contract is maritime or not depends on the nature and character of the contract *(Insurance Co. v. Dunham, supra)* though there must be a union of ship and cargo to give rise to jurisdiction *in rem.*

Kaisha v. Pacific Export Lumber Co., 260 U. S. 490;
The Saturnus, 250 Fed. 407.

If the contract be maritime in its nature, jurisdiction *in personam* attaches though there exists no maritime lien or privilege.

Insurance Co. v. Dunham, supra.

If the object of the contract is a maritime service, jurisdiction attaches either *in rem* or *in personam*, or both; for the breach of a contract of affreightment *(i. e.*, a failure to perform a maritime service) jurisdiction *in personam* attaches; for a breach after a union of ship and cargo, jurisdiction *in rem* also attaches. In the former, navigation was contemplated but not performed; in the latter, it was wrongfully performed.

Crimes committed aboard a vessel of the United States have no connection with navigation but none the less the power of Congress over crimes and their pun-

ishment, by virtue of Article III, Section 2 of the Constitution, is undoubted.

United States v. Flores, supra.

The opinion in this case makes it clear that the basis of jurisdiction is the ship—the sole instrumentality upon which the admiralty and maritime jurisdiction operates, and that such jurisdiction extends to any waters where the ship may navigate.

Maritime torts necessarily involve navigation. Action is essential to give rise to the tort. Locality is, therefore, the test of jurisdiction but obviously the basis of the jurisdiction is still the ship. The territorial limits of that jurisdiction are, again, all waters in which the ship may navigate.

It, therefore, follows that in the classes mentioned as well as those not mentioned, it is the ship which furnishes the essential basis of the jurisdiction; that the jurisdiction attaches because the ship is the sole instrumentality of navigation; that without the ship there could be no maritime contracts; without the ship there could be no maritime torts; without the ship there could be no crimes over which admiralty exercises jurisdiction, and without the ship there would be no maritime law to be applied.

That the ship is the fundamental basis for the attachment of admiralty jurisdiction of the Court seems to be made manifest by the case of *Richardson v. Harmon, supra.* In that case jurisdiction of the admiralty court to limit liability was sustained solely by force of the Judiciary Act noted above, and notwithstanding that

the tort was concededly non-maritime. To be sure navigation was involved. Action was required to give rise to negligence; but would the result be different if limitation be sought for damage to buildings by fire negligently caused by those in charge of a ship lying sunk at a wharf? *

A valid preferred mortgage lien having been created by Congress, jurisdiction of the admiralty court would follow by virtue of the jurisdiction conferred by the Judiciary Act without express enactment. But the Congress has not left the question of jurisdiction to implication. By the express provisions of Subsection K of the Ship Mortgage Act (see appendix) Congress has vested exclusive jurisdiction in the District Courts *in rem* to foreclose the lien of the preferred mortgage. This presents no anomaly. Both by virtue of grant of general jurisdiction by the Judiciary Act, as well as by the express provisions of Subsection K of the Ship Mortgage Act, if the subject matter of the Act is within the language of the Constitution, and thus a valid exercise of the power of Congress, exclusive jurisdiction vests in the District Court over an action *in rem* brought for the foreclosure of a preferred mortgage lien, and that jurisdiction may be defeated only by the destruction of the preferred status of the mortgage.

Ships are the sole instrumentalities of water-borne commerce over which Congress, under its maritime jurisdiction, has complete control. The act in question merely creates a preferred mortgage lien against these instrumentalities and subordinates all maritime liens,

* Limitation in admiralty was had on this state of facts in the case of The West Point, 271 Fed. 502. See also The Omar D. Conger, 1 Fed. (2d) 732.

except those expressly enumerated in the statute, to the mortgage lien thus created. The same power that can create new maritime liens and limit liability of shipowners for all liabilities, including non-maritime torts, can most certainly authorize the hypothecation of a ship, a *personified res*. Having the power to create the preferred mortgage lien, Congress most certainly can provide for the enforcement of such a lien in the District Courts of the United States.

POINT III.

The construction given to the Ship Mortgage Act by the majority of the Court below largely impairs, if not completely defeats, the purpose of Congress in enacting the statute.

The language of the Ship Mortgage Act (printed in the appendix) is precise, definite and certain.

Subsection D enumerates in detail every step to be taken in order that the mortgage may attain the preferred status created by the Act. Strict compliance with every requirement of the Act is, therefore, necessary.

The mortgage having attained such a preferred status through strict compliance with the Act, Subsection K provides that such a preferred mortgage shall constitute a lien upon the mortgage vessel.

By the provisions of Subsection K, upon default of any term or condition of the mortgage, such lien may be enforced by the mortgagee by suit *in rem* in ad-

miralty, of which suit exclusive original jurisdiction is granted to the District Courts of the United States.

Subsection M provides that upon the sale of any mortgaged vessel by order of the District Court in any such action *in rem* for the enforcement of a preferred mortgage lien, such lien shall have priority over all claims against the vessel, except certain specific liens (therein denominated preferred maritime liens), and the costs and expenses of such action.

The libels in these cases allege a full and complete compliance with every provision of the Ship Mortgage Act necessary to make the mortgages preferred mortgages under the Act. The answers interposed *admit* that every act and thing necessary to be done was done to make these mortgages preferred mortgages under the Act, and further expressly admit that the mortgages are preferred mortgages under the Act.

The majority opinion of the Circuit Court of Appeals in these cases has, for the first time, grafted on to the Ship Mortgage Act, a further and additional condition not warranted by the language of the Act, and which would seem to be negatived by the express terms of the Act. This condition imposed by the Court below, in effect, is that no matter how strict the compliance with the express provisions of the Act, if the intention existed, known to both mortgagor and mortgagee, to devote a substantial portion of the proceeds to non-maritime uses, the preferred status accorded by the Act is not attained, at least insofar as jurisdiction of the District Court to enforce the preferred mortgage lien following default is concerned.

That Congress did not contemplate any allocation of the proceeds of a preferred mortgage to specific uses is evident from the lack of any express provision therefor in the context of the Ship Mortgage Act. Moreover, that Congress did not intend any implied limitation on the use of the proceeds is fairly evidenced (as heretofore pointed out in Point I) by the express provisions of paragraph (e) of Subsection D of the Act (see appendix), as well as by the provisions of Section 11 of the Merchant Marine Act, 1920, of which the Ship Mortgage Act constituted a part.

No provision of the Ship Mortgage Act lends support to the conclusion reached.

The majority opinion of the Circuit Court of Appeals purports to defeat jurisdiction of the District Court upon the single ground that the mortgagor and mortgagee had knowledge at the time the mortgages were executed that a substantial part of the proceeds was to be devoted to non-maritime uses.

The jurisdiction granted by the Ship Mortgage Act cannot be defeated except by the destruction of the preferred status of the mortgages. But the preferred status attained through compliance with the conditions of the statute may not in these cases be destroyed. Reference to the respective mortgages which are attached to and expressly made a part of the libels (R. 5, 40) shows that the mortgagor solemnly covenanted and engaged that all requisite corporate action on its part for the execution and delivery of the bonds and of the respective mortgages had been taken (R. 17-18, 51-52); that the mortgagor would, in all

respects, comply with the provisions of the Ship Mortgage Act so as to create and maintain the respective mortgages as preferred mortgages within the provisions of the Act, and would perform such acts as requested by the Trustee, as reasonably calculated to preserve the preferred status of the mortgages until fully paid and performed (R. 20, 54). Moreover, Article XIII of the respective mortgages provides:

> "Preferred Mortgage.
> That the mortgagor shall comply with and satisfy all the provisions of the 'Ship Mortgage Act, 1920' and shall establish and maintain this mortgage as a first preferred mortgage under said Act". (R. 22, 56).

In the face of these covenants contained in the mortgages, the preferred status of the mortgages in suit cannot be destroyed and the jurisdiction of the District Court over actions *in rem* to enforce such preferred mortgages necessarily follows.

Moreover, if effect be given to the admissions contained in the answers interposed herein and to the binding character of the specific affirmative covenants contained in the preferred mortgages at bar, the mortgagor was estopped from offering testimony either for the purpose of attacking the validity of the mortgages or of defeating the jurisdiction of the Court to enforce the mortgages. Notwithstanding, the majority opinion of the Court below is based upon this wholly incompetent testimony.

The strained and illogical construction placed upon the Ship Mortgage Act by the majority of the Circuit Court of Appeals will have the inevitable effect of

largely impairing, if not completely defeating, the purpose of Congress in enacting the legislation. The fostering, development and protection of our national merchant marine has been, and is, the time honored and fixed policy of our government. The Ship Mortgage Act, 1920, together with the Merchant Marine Act, 1920, of which it was enacted as a part, were enacted by Congress in furtherance of that policy. As a result of such enactment, the building of ships and the investment of capital therein were intended to be promoted. But, under the majority decision of the Court below, purchasers of bonds secured by preferred mortgages given under the Ship Mortgage Act will no longer be able to rest secure upon the assurance which should follow from a strict compliance with the express provisions of the Ship Mortgage Act. For strict compliance will afford no assurance, since under the decision of the majority of the Court below, that assurance may be completely destroyed by testimony *aliunde* the instrument itself relating to how the moneys thus secured were to be expended. By thus opening wide the door for attack upon preferred mortgages through testimony *dehors* the instruments themselves, the value of such bonds as a security will be largely impaired, if not completely destroyed in individual cases. The pernicious effect upon future efforts to obtain financing upon the security of preferred mortgages is certain.

Moreover, the decision of the Court below serves to introduce a basis for refined and technical distinctions dependent upon the discretion of the individual judge as to the character of the use to which the proceeds were put. This necessarily will result in great un-

certainty in litigation respecting preferred mortgages; and, in turn, will react upon the value of the security itself and will contribute to further impair the usefulness which Congress intended should be made of preferred mortgages. Obviously, the public will not purchase this type of security under such circumstances, nor can the Federal Government justify further application of public moneys in aid of ship construction under such circumstances.

It follows that if this decision stands, the purpose of Congress in enacting the Ship Mortgage Act will be defeated.

CONCLUSION.

The decrees of the Circuit Court of Appeals herein should be reversed and the decrees of the District Court should be affirmed, with costs.

August 25, 1934, Buffalo, New York.

Respectfully submitted,

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APPENDIX.

Ship Mortgage Act.

Act June 5, 1920, Chapter 250, Section 30, (Subsections A—W); 41 Stat. 1000-1006; 46 U. S. C., Chapter 25, Sections 911-984.

Subsection A; (41 Stat. 1000; 46 U. S. C. Sec. 984)

"Ship Mortgage Act." Section 30 Act of June 5, 1920, Chapter 250, may be cited as the "Ship Mortgage Act, 1920."

Subsection B; (41 Stat. 1000; 46 U. S. C. Sec. 911)

Words and Terms used in Chapter. When used in this chapter—

(1) The term "document" includes registry and enrollment and license;

(2) The term "documented" means registered or enrolled or licensed under the laws of the United States, whether permanently or temporarily;

(3) The term "port of documentation" means the port at which the vessel is documented, in accordance with law;

(4) The term "vessel of the United States" means any vessel documented under the laws of the United States and such vessel shall be held to continue to be so documented until its documents are surrendered with the approval of the board; and

(5) The term "mortgagee", in the case of a mortgage involving a trust deed and a bond issue thereunder, means the trustee designated in such deed.

Subsection C; (41 Stat. 1000; 46 U. S. C. Sec. 921)

Sale, Conveyance, or Mortgage of Vessel of the United States; Record. (a) No sale, conveyance, or mortgage which, at the time such sale, conveyance, or mortgage is made, includes a vessel of the United States, or any portion thereof, as the whole or any part of the property sold, conveyed, or mortgaged shall be valid, in respect to such vessel, against any person other than the grantor or mortgagor, his heir or devisee, and a person having actual notice thereof, until such bill of sale, conveyance, or mortgage is re-

corded in the office of the collector of customs of the port of documentation of such vessel, as provided in subdivision (b) of this subsection.

(b) Such collector of customs shall record bills of sale, conveyances, and mortgages, delivered to him, in the order of their reception, in books to be kept for that purpose and indexed to show—

(1) The name of the vessel;

(2) The names of the parties to the sale, conveyance or mortgage;

(3) The time and date of reception of the instrument;

(4) The interest in the vessel so sold, conveyed or mortgaged; and

(5) The amount and date of maturity of the mortgage.

Subsection D; (41 Stat. 1000; 46 U. S. C. Sec. 922)

Preferred Mortgages. (a) A valid mortgage, which, at the time it is made includes the whole of any vessel of the United States of 200 gross tons and upward, shall in addition have, in respect to such vessel and as of the date of the compliance with all the provisions of this subdivision, the preferred status given by the provisions of Subsection M, section 953, if—

(1) The mortgage is indorsed upon the vessel's documents in accordance with the provisions of this chapter;

(2) The mortgage is recorded as provided in subsection C, section 921, together with the time and date when the mortgage is so indorsed;

(3) An affidavit is filed with the record of such mortgage to the effect that the mortgage is made in good faith and without any design to hinder, delay, or defraud any existing or future creditor of the mortgagor or any lienor of the mortgaged vessel;

(4) The mortgage does not stipulate that the mortgagee waives the preferred status thereof; and

(5) The mortgagee is a citizen of the United States.

(b) Any mortgage which complies in respect to any vessel with the conditions enumerated in this subsection is hereafter in this chapter called a "preferred mortgage" as to such vessel.

(c) There shall be indorsed upon the documents of a vessel covered by a preferred mortgage—

(1) The names of the mortgagor and mortgagee;

(2) The time and date the indorsement is made;

(3) The amount and date of maturity of the mortgage; and

(4) Any amount required to be indorsed by the provisions of subdivision (e) or (f) of this subsection.

(d) Such indorsement shall be made (1) by the collector of customs of the port of documentation of the mortgaged vessel, or (2) by the collector of customs of any port in which the vessel is found, if such collector is directed to make the indorsement by the collector of customs of the port of documentation; and no clearance shall be issued to the vessel until such indorsement is made. The collector of customs of the port of documentation shall give such direction by wire or letter at the request of the mortgagee and upon the tender of the cost of communication of such direction. Whenever any new document is issued for the vessel, such indorsement shall be transferred to and indorsed upon the new document by the collector of customs.

(e) A mortgage which includes property other than a vessel shall not be held a preferred mortgage unless the mortgage provides for the separate discharge of such property by the payment of a specified portion of the mortgage indebtedness. If a preferred mortgage so provides for the separate discharge, the amount of the portion of such payment shall be indorsed upon the documents of the vessel.

(f) If a preferred mortgage includes more than one vessel and provides for the separate discharge of each vessel by the payment of a portion of the mortgage indebtedness, the amount of such portion of such payment shall be indorsed upon the documents of the vessel. In case such mortgage does not provide for the separate discharge of a vessel and the vessel is to be sold upon the order of a district court of the United States in a suit *in rem* in admiralty, the court shall determine the portion of the mortgage indebtedness increased by 20 per centum (1) which, in the opinion of the court, the approximate value of the vessel bears

to the approximate value of all the vessels covered by the mortgage, and (2) upon the payment of which the vessel shall be discharged from the mortgage.

Subsection E; (41 Stat. 1001; 46 U. S. C. Sec. 923)

Certified Copies of Mortgage; Exhibition. The collector of customs upon the recording of a preferred mortgage shall deliver two certified copies thereof to the mortgagor who shall place, and use due diligence to retain, one copy on board the mortgaged vessel and cause such copy and the documents of the vessel to be exhibited by the master to any person having business with the vessel, which may give rise to a maritime lien upon the vessel or to the sale, conveyance, or mortgage thereof. The master of the vessel shall, upon the request of any such person, exhibit to him the documents of the vessel and the copy of any preferred mortgage of the vessel placed on board thereof.

Subsection F; (41 Stat. 1002; 46 U. S. C. Sec. 924)

Prior and Subsequent Maritime Liens on Mortgaged Vessel. The mortgagor (1) shall, upon request of the mortgagee, disclose in writing to him prior to the execution of any preferred mortgage, the existence of any maritime lien, prior mortgage, or other obligation or liability upon the vessel to be mortgaged, that is known to the mortgagor, and (2), without the consent of the mortgagee, shall not incur, after the execution of such mortgage and before the mortgagee has had a reasonable time in which to record the mortgage and have indorsements in respect thereto made upon the documents of the vessel, any contractual obligation creating a lien upon the vessel other than a lien for wages of stevedores when employed directly by the owner, operator, master, ship's husband, or agent of the vessel, for wages of the crew of the vessel, for general average, or for salvage, including contract salvage, in respect to the vessel.

Subsection G; (41 Stat. 1002; 46 U. S. C. Sec. 925)

Record of Notice of Claim of Lien on Mortgaged Vessel; Discharge of Lien. (a) The collector of customs of the port of documentation shall upon the request of any person, record notice of his claim of a lien upon a vessel covered by a preferred mortgage, together with the nature, date of creation, and amount of the lien, and the name and address of the person. Any person who has caused notice of his claim of lien to be so recorded shall, upon a discharge in whole or in part of the indebtedness, forthwith file with the collector of customs a certificate of such discharge. The collector of customs shall thereupon record the certificate.

(b) The mortgagor upon a discharge in whole or in part of the mortgage indebtedness, shall forthwith file with the collector of customs for the port of documentation of the vessel, a certificate of such discharge. Such collector of customs shall thereupon record the certificate. In case of a vessel covered by a preferred mortgage, the collector of customs at the port of documentation shall (1) indorse upon the documents of the vessel, or direct the collector of customs at any port in which the vessel is found, to so indorse, the fact of such discharge, and (2) shall deny clearance to the vessel until such indorsement is made.

Subsection H; (41 Stat. 1002; 46 U. S. C. Sec. 926)

Conditions Precedent to Record; Interest on Preferred Mortgage. (a) No bill of sale, conveyance, or mortgage shall be recorded unless it states the interest of the grantor or mortgagor, in the vessel, and the interest so sold, conveyed or mortgaged.

(b) No bill of sale, conveyance, mortgage, notice of claim of lien, or certificate of discharge thereof, shall be recorded unless previously acknowledged before a notary public or other officer authorized by a law of the United States, or of a State, Territory, District, or possession thereof, to take acknowledgment of deeds.

(c) In case of a change in the port of documentation of a vessel of the United States, no bill of sale, conveyance, or mortgage shall be recorded at the new port of documentation unless there is furnished to the collector of customs of such port, together with the copy of the bill of sale, conveyance, or mortgage to be recorded, a certified copy of the record of the vessel at the former port of documentation furnished by the collector of such port. The collector of customs at the new port of documentation is authorized and directed to record such certified copy.

(d) A preferred mortgage may bear such rate of interest as is agreed by the parties thereto.

Subsection I; (41 Stat. 1002; 46 U. S. C. Sec. 927)

Inspection of and Copies from Records; Fees. Each collector of customs shall permit records, made under the provisions of this chapter to be inspected during office hours under such reasonable regulations as the collector may establish. Upon the request of any person the collector of customs shall furnish him from the records of the collector's office (1) a certificate setting forth the names of the owners of any vessel, the interest held by each owner, and the material facts as to any bill of sale or conveyance of any mortgage covering, or any lien or other incumbrance upon, a specified vessel, (2) a certified copy of any bill of sale, conveyance, mortgage, notice of claim of lien, or certificate of discharge in respect to such vessel, or (3) a certified copy as required by subdivision (c) of subsection H, section 926. The collector of customs shall collect a fee for any bill of sale, conveyance, or mortgage recorded, or any certificate or certified copy furnished, by him, in the amount of 20 cents a folio, with a minimum charge of $1. All such fees shall be covered into the Treasury of the United States as miscellaneous receipts.

Subsection J; (41 Stat. 1003; 46 U. S. C. Sec. 941)

Failure of Master to Exhibit Documents; Unlawful Acts by Mortgagor; Liability of Collector of Customs. (a) If the master of the vessel wilfully fails to

exhibit the documents of the vessel or the copy of any preferred mortgage thereof, as required by subsection E, the board of local inspectors of vessels having jurisdiction of the license of the master, may suspend or cancel such license, subject to the provisions of sections 431 to 434, inclusive.

(b) A mortgagor who, with the intent to defraud, violates any provision of Subsection F, section 924, and if the mortgagor is a corporation or association, the president or other principal executive officer of the corporation or association, shall upon conviction thereof be held guilty of a misdemeanor and shall be fined not more than $1,000 or imprisoned not more than two years, or both. The mortgaged indebtedness shall thereupon become immediately due and payable at the election of the mortgagee.

(c) If any person enters into any contract secured by, or upon the credit of, a vessel of the United States covered by a preferred mortgage, and suffers pecuniary loss by reason of the failure of the collector of customs, or any officer, employee, or agent thereof, properly to perform any duty required of the collector under the provisions of this chapter, the collector of customs shall be liable to such person for damages in the amount of such loss. If any such person is caused any such loss by reason of the failure of the mortgagor, or master of the mortgaged vessel, or any officer, employee or agent thereof, to comply with any provision of subsection E or F, section 923 or 924, or to file an affidavit as required by subdivision (a) of subsection D, section 922, correct in each particular thereof, the mortgagor shall be liable to such person for damages in the amount of such loss. The district courts of the United States are given jurisdiction (but not to the exclusion of the courts of the several States Territories, Districts, or possessions) of suits for the recovery of such damages, irrespective of the amount involved in the suit or the citizenship of the parties thereto. Such suit shall be begun by personal service upon the defendant within the limits of the district. Upon judgment for the plaintiff in any such suit, the court shall include in the judgment an additional

amount for costs of the action and a reasonable counsel's fee, to be fixed by the court.

Subsection K; (41 Stat. 1003; 46 U. S. C. Section 951)

Lien of Preferred Mortgage; Foreclosure; Jurisdiction; Procedure. A preferred mortgage shall constitute a lien upon the mortgaged vessel in the amount of the outstanding mortgage indebtedness secured by such vessel. Upon the default of any term or condition of the mortgage, such lien may be enforced by the mortgagee by suit *in rem* in admiralty. Original jurisdiction of all such suits is granted to the district courts of the United States exclusively. In addition to any notice by publication, actual notice of the commencement of any such suit shall be given by the libelant, in such manner as the court shall direct, to (1) the master, other ranking officer, or caretaker of the vessel, and (2) any person who has recorded a notice of claim of an undischarged lien upon the vessel, as provided in subsection G, section 925, unless after search by the libelant satisfactory to the court, such mortgagor, master, other ranking officer, caretaker, or claimant is not found within the United States. Failure to give notice to any such person, as required by this subsection, shall not constitute a jurisdictional defect; but the libelant shall be liable to such person for damages in the amount of his interest in the vessel terminated by the suit. Suit *in personam* for the recovery of such damages may be brought in accordance with the provisions of subdivision (c) of subsection J, section 941.

Subsection L; (41 Stat. 1004; 46 U. S. C. Section 952)

Receiver in Foreclosure; Possession by Marshal. In any suit *in rem* in admiralty for the enforcement of the preferred mortgage lien, the court may appoint a receiver and, in its discretion, authorize the receiver to operate the mortgaged vessel. The marshal may be authorized and directed by the court to take possession of the mortgaged vessel notwithstanding the fact that the vessel is in the possession or under the control of any person claiming a possessory common-law lien.

Subsection M; (41 Stat. 1004; 46 U. S. C. Section 953)

Preferred Maritime Lien; Priorities; Other Liens. (a) When used hereinafter in this chapter, the term "preferred maritime lien" means (1) a lien arising prior in time to the recording and indorsement of a preferred mortgage in accordance with the provisions of this chapter; or (2) a lien for damages arising out of tort, for wages of a stevedore when employed directly by the owner, operator, master, ship's husband, or agent of the vessel, for wages of the crew of the vessel, for general average, and for salvage, including contract salvage.

(b) Upon the sale of any mortgaged vessel by order of a district court of the United States in any suit *in rem* in admiralty for the enforcement of a preferred mortgage lien thereon, all pre-existing claims in the vessel, including any possessory common-law lien of which a lienor is deprived under the provisions of subsection L, section 952, shall be held terminated and shall thereafter attach, in like amount and in accordance with their respective priorities, to the proceeds of the sale; except that the preferred mortgage lien shall have priority over all claims against the vessel, except (1) preferred maritime liens, and (2) expenses and fees allowed and costs taxed, by the court.

Subsection N; (41 Stat. 1004; 46 U. S. C. Section 954)

Suits in Personam in Admiralty on Default. (a) Upon the default of any term or condition of a preferred mortgage upon a vessel, the mortgagee may, in addition to all other remedies granted by this chapter, bring suit *in personam* in admiralty in a district court of the United States, against the mortgagor for the amount of the outstanding mortgage indebtedness secured by such vessel or any deficiency in the full payment thereof.

(b) This chapter shall not be construed, in the case of a mortgage covering, in addition to vessels, realty or personalty other than vessels, or both, to authorize the enforcement by suit *in rem* in admiralty of the rights of the mortgagee in respect to such realty or personalty other than vessels.

Subsection O; (41 Stat. 1004; 46 U. S. C. Section 961)

Surrender of Documents; Termination of Mortgagee's Interest; Sale of Mortgaged Vessel. (a) The documents of a vessel of the United States covered by a preferred mortgage may not be surrendered (except in the case of the forfeiture of the vessel or its sale by the order of any court of the United States or any foreign country) without the approval of the board. The board shall refuse such approval unless the mortgagee consents to such surrender.

(b) The interest of the mortgagee in a vessel of the United States covered by a mortgage, shall not be terminated by the forfeiture of the vessel for a violation of any law of the United States, unless the mortgagee authorized, consented, or conspired to effect the illegal act, failure or omission which constituted such violation.

(c) Upon the sale of any vessel of the United States covered by a preferred mortgage, by order of a district court of the United States in any suit *in rem* in admiralty for the enforcement of a maritime lien other than a preferred maritime lien, the vessel shall be sold free from all pre-existing claims thereon; but the court shall, upon the request of the mortgagee, the libelant, or any intervenor, require the purchaser at such sale to give and the mortgagor to accept a new mortgage of the vessel for the balance of the term of the original mortgage. The conditions of such new mortgage shall be the same, so far as practicable, as those of the original mortgage and shall be subject to the approval of the court. If such new mortgage is given, the mortgagee shall not be paid from the proceeds of the sale and the amount payable as the purchase price shall be held diminished in the amount of the new mortgage indebtedness.

(d) No rights under a mortgage of a vessel of the United States shall be assigned to any person not a citizen of the United States without the approval of the board. Any assignment in violation of any provision of this chapter shall be void.

(e) No vessel of the United States shall be sold by order of a district court of the United States in any

suit *in rem* in admiralty to any person not a citizen of the United States.

Subsection P; (41 Stat. 1005; 46 U. S. C. Section 971)

Persons Entitled to Lien. Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit *in rem,* and it shall not be necessary to allege or prove that credit was given to the vessel.

Subsection Q; (41 Stat. 1005; 46 U. S. C. Section 972)

Persons Authorized to Procure Repairs, Supplies, and Necessaries. The following persons shall be presumed to have authority from the owner to procure repairs, supplies, towage, use of dry dock or marine railway, and other necessaries for the vessel: The managing owner, ship's husband, master, or any person to whom the management of the vessel at the port of supply is intrusted. No person tortiously or unlawfully in possession or charge of a vessel shall have authority to bind the vessel.

Subsection R; (41 Stat. 1005; 46 U. S. C. Section 973)

Notice to Person Furnishing Repairs, Supplies, and Necessaries. The officers and agents of a vessel specified in Subsection Q, section 972, shall be taken to include such officers and agents when appointed by a charterer, by an owner *pro hac vice,* or by an agreed purchaser in possession of the vessel; but nothing in this chapter shall be construed to confer a lien when the furnisher knew, or by exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies, or other necessaries was without authority to bind the vessel therefor.

Subsection S; (41 Stat. 1005; 46 U. S. C. Section 974)

Waiver of Right to Lien. Nothing in this chapter shall be construed to prevent the furnisher of repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, or the mortgagee, from waiving his right to a lien, or in the case of a preferred mortgage lien, to the preferred status of such lien, at any time, by agreement or otherwise; and this chapter shall not be construed to affect the rules of law existing on June 5, 1920, in regard to (1) the right to proceed against the vessel for advances, (2) laches in the enforcement of liens upon vessels, (3) the right to proceed *in personam*, (4) the rank of preferred maritime liens among themselves, or (5) priorities between maritime liens and mortgages, other than preferred mortgages, upon vessels of the United States.

Subsection T; (41 Stat. 1006; 46 U. S. C. Section 975)

State Statutes Superseded. This chapter shall supersede the provisions of all State statutes conferring liens on vessels, insofar as such statutes purport to create rights of action to be enforced by suits *in rem* in admiralty against vessels for repairs, supplies, towage, use of dry dock or marine railway, and other necessaries.

Subsection U; (41 Stat. 1006; 46 U. S. C. Section 981)

Existing Mortgages Not Affected. This chapter shall not apply (1) to any existing mortgage, or (2) to any mortgage hereafter placed on any vessel under an existing mortgage, on June 5, 1920, so long as such existing mortgage remains undischarged.

Subsection V; (41 Stat. 1006; 46 U. S. C. Section 982)

Books for Collectors of Customs. The Secretary of Commerce is authorized and directed to furnish collectors of customs with all necessary books and records, and with certificates of registry and of enrollment and license in such form as provides for the making of all indorsements thereon required by this chapter.

Subsection W; (41 Stat. 1006; 46 U. S. C. Section 983)

Rules and Regulations by Secretary of Commerce. The Secretary of Commerce is authorized to make such regulations in respect to the recording and indorsing of mortgages covering vessels of the United States, as he deems necessary to the efficient execution of the provisions of this chapter.

Provisions Supplementary to Navigation Laws and the Ship Mortgage Act.

ACT FEBRUARY 16, 1925, CHAPTER 235, SECTIONS 2-5; 43 STAT. 948; 46 U. S. C. CHAPTER 26, SECTIONS 1011-1014.

Section 2; (43 Stat. 948; 46 U. S. C. Sec. 1012)

RECORD AT HOME PORT. No bill of sale, conveyance, mortgage, assignment of mortgage, or hypothecation (except bottomry), which includes a vessel of the United States or any portion thereof shall be valid in respect to such vessel against any person other than the grantor or mortgagor, his heirs or devisees, and any person having actual notice thereof, until such bill of sale, conveyance, mortgage, assignment of mortgage, or hypotheeation is recorded in the office of the collector of customs at the home port of such vessel. Any bill of sale or conveyance of the whole or any part of a vessel shall be recorded at the home port of such vessel as shown in her new document.

Section 3; (43 Stat. 948; 46 U. S. C. Sec. 1013)

CONVEYANCES AND OTHER INSTRUMENTS AND ACTS VALIDATED. All conveyances and mortgages of any vessel or any part thereof, and all documentations, recordations, indorsements, and indexing thereof, and proceedings incidental thereto made or done, prior to February 16, 1925, are declared valid to the extent they would have been valid if the port or ports at which said vessel has in fact been doc-

umented from time to time had been the port or ports at which it should have been documented in accordance with law; and this section is declared retroactive so as to accomplish such validations; *Provided,* That nothing herein contained shall be construed to deprive any person of any vested right.

Section 4; (43 Stat. 948; 46 U. S. C. Sec. 1011) PORT OF DOCUMENTATION. Whenever in the Ship Mortgage Act, 1920, otherwise known as section 30 of the Merchant Marine Act, 1920, chapter 25 of this title, the words "port of documentation" are used they shall be deemed to mean the "home port" of the vessel, except that the words "port of documentation" shall not include a port in which a temporary document is issued.

Section 5; (43 Stat. 948; 46 U. S. C. Sec. 1014) NAVIGATION LAWS AND SHIP MORTGAGE ACT AMENDED. All such provisions of the navigation laws of the United States and of the Ship Mortgage Act, 1920, otherwise known as section 30 of the Merchant Marine Act, 1920, chapter 25 of this title, as are in conflict with sections 18, 1011, 1012 and 1013, are amended to conform herewith.